No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street, Los Angeles 12,
LEO GALLAGHER,
111 West Seventh Street, Los Angeles 14,
HERBERT GANAHL,
814 Merritt Building, Los Angeles 14,
Attorneys for Appellant.

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
Of Counsel, American Civil Liberties Union,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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REPLY BRIEF FOR APPELLANT.

At the outset we believe it should be clearly stated what is, and what is not, involved in the appeal at bar. There is no question in this case of affiliation with the Communist or any similar political party or group; there is no finding, charge, evidence, or indication to this effect. The question in this case arises from the unquestioned fact that appellant was what is known as a "liberal" or "progressive"; he was idealistic and social-minded, and a person who believed in attempting to improve the living conditions of the community as a whole. The District Court found that appellant's views included a belief in economic collectivism and a disbelief in the future of capitalism and that such belief was inconsistent with "the principles of the Constitution" within the meaning of the naturalization law; and the question before this Court

is whether the District Court erred in this finding and in this conclusion.

But for this question no doubt has or can be raised as to appellant's attachment and his eligibility for citizenship. He has lived in the United States without interruption since childhood and, partly because he has not taken his adopted country for granted, believes ardently in the future of the United States and the freedom and opportunity he has found in this country. He enlisted in the United States Army in World War I[1] and engaged in civilian defense work and other community activities during World War II; he is devoted to his home and family, is of a religious nature, a respected and responsible member of the community, and married to a native-born American citizen of similar standing. (See Appellant's Main Brief for record references in support of the above statements as to appellant's character, pp. 4-6.)

Reply to Appellee's Point I.

Appellant has at all times recognized that evidence of his activities prior to the one-year statutory period is proper matter for consideration in determining the beliefs he held during such period, and it is not therefore necessary or relevant to consider appellee's protracted argument to establish this uncontested point. Appellant's position as to the evidence and the validity of the findings of fact, which is stated in Point I of our main brief, is

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[1]Contrast opinions referring to reluctance to serve in the armed forces as evidence of lack of attachment: *Hauge v. United States,* 276 Fed. 111 (C. C. A. 9th, 1921); *In re Aldecoa,* 22 F. Supp. 659 (D. Id., 1938); *In re Linder,* 292 Fed. 1001 (D. C., S. D. Calif., S. D., 1923); *In re Shanin,* 278 Fed. 739 (D. Mass., 1922); *In re Tomarchio,* 269 Fed. 400 (D. Mo., 1920).

briefly as follows: (1) the evidence on which the District Judge relied to support his finding that appellant believed the capitalist ownership of industry must be supplanted by collectivism, and the only evidence bearing on this finding, was the speech appellant made in 1934-1935 and the testimony of several former students and fellow-teachers at the college; (2) such testimony was so insubstantial and contradictory in so far as it relates to this finding that it affords no support for the finding;[2] (3) the finding is, therefore, only supported by the 1934-35 speech; (4) the probative force of the speech is necessarily affected by the length of time between its delivery and the one-year statutory period for which the District Judge was determining appellant's belief; (5) thus, the inference that appellant possessed during that period the beliefs represented by the speech is weakened by the fact that approximately ten years elapsed between the speech and the period in question; (6) in view of this weakness, together with other factors making the asserted change of appellant's beliefs likely and credible,[3] the testimony in appellant's favor[4] is fully and clearly sufficient to overcome the inference that he possessed during the later period the beliefs represented by the speech.

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[2]The District Court cannot base its findings on incredible and self-contradictory evidence against the petitioner. See *Petition of Kohl,* 146 F. (2d) 347, 348 (C. C. A. 2, 1945), in which the judgment denying citizenship was reversed and the District Court was directed to grant the petition.

[3]See Main Brief, pp. 23-24.

[4]Appellee's characterization of all the testimony in appellant's favor as negative (Brief, p. 14) is inaccurate. We assume this term could be applied to testimony that the witness does not know whether or not the subject possessed the beliefs in question; while some of appellant's witnesses were not acquainted with his economic and social views, others gave positive testimony as to his social views during the period in question (See Main Brief, p. 24).

It seems indisputable that due weight must be given to the period of time elapsing between the conduct on which the lower court relies and the period for which the beliefs are in issue; and courts of appeal have had occasion in several instances to consider this time factor in reversing, for insufficient supporting evidence, judgments denying citizenship.[5] The possibility of change of views with the passage of time is, indeed, almost a postulate of the naturalization law and procedure, as is most vividly illustrated by those decisions dealing with the filing of a new petition after a denial of citizenship,[6] as well as by a recent Circuit Court decision affirming the grant of citizenship to an alien on the basis of his conduct during the required pre-petition period though he had been found some years before, in a deportation proceeding, to be deportable as a member of an organization advocating overthrow of the government by force and violence.[7]

The weight to be accorded to the passage of time in determining whether a state of affairs once shown to exist continues to do so has been recently emphasized by the United States Supreme Court in a bankruptcy case in which this presumption of continuance was crucial. *Maggio v. Zeitz,* No. 38, October Term 1947, decided Feb. 9, 1948. There the Court said:

> "Under some circumstances it may be permissible, in resolving the unknown from the known, to reach

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[5]*In re Bogunovic,* 18 Cal. (2d) 160, 114 P. (2d) 581 (1941); *Petition of Zele,* 140 F. (2d) 773 (C. C. A. 2, 1944).

[6]*Repouille v. United States,* 165 F. (2d) 152 (C. C. A. 2, 1947); *In re Bevelacqua,* 295 Fed. 862 (D. Mass., 1924); *Petition of Escher,* 279 Fed. 792 (D. Tex., 1922).

[7]*United States v. Waskowski,* 158 F. (2d) 962 (C. C. A. 7, 1947).

> the conclusion of present control from proof of previous possession. Such a process, sometimes characterized as a 'presumption of fact', is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved . . . the inference from yesterday's possession is one thing, that permissible from possession 20 months ago quite another."

And in a footnote summing up the position of the Circuit Courts other than that whose decision was under review, the Court said:

> "Other circuits have treated the presumption of continued possession as one which 'grows weaker as time passes, until it finally ceases to exist' . . . and which loses its force and effect as time intervenes . . ."

The Supreme Court's language is no less applicable to a presumption concerning the continued possession of beliefs than the continued possession of property.

Reply to Appellee's Point II.

We respectfully submit that appellee's Point II wholly fails to meet the issues of the case at bar. Instead of discussing the proper interpretation of the statutory requirement of "attachment to the principles of the Constitution", appellee deals with this important question of law as if a petition for naturalization is to be granted or denied on the basis of the District Judge's individual view as to the soundness of the petitioner's beliefs. It would seem apparent that this requirement, more than any

other, is to be construed in the light of established legal criteria rather than emotional reactions.[8]

Further, appellee not only seems to ignore the fact that the Court's function is to interpret and apply the requirements for naturalization established by Congress, but also to disregard the fact that there is an established procedure for adjudication of petitions and appeals therefrom. For appellee makes little, if any, attempt to support the District Judge's findings of fact or to demonstrate that on these findings his conclusion of lack of attachment to the principles of the Constitution is valid; instead, the appellee relies on vague characterizations of appellant's reputation, and searches the transcript for assertedly prejudicial items even though they have no relation whatsoever to the District Court's findings or conclusion.[9] The un-

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[8]Compare treatment of the requirement of a "good moral character" in *Repouille v. United States,* 165 F. (2d) 152 (C. C. A. 2, 1947) in which the Court pointed out that the standard for such character was the prevalent moral feeling in the community. Even here, however, the test is an objective one, rather than dependent on the personal predilections of the District Judge.

[9]Lewis, who is quoted by appellee as testifying that appellant stated he was going to teach Marxism at City College (App. Brief, p. 18), testified that this statement was part of a public speech, rather than a covert conversation, and could not recall any of the context, but merely that appellant "used the word" (Marxism) [Tr. 7]. Marxism was, of course, in the curriculum taught by appellant as well as by the other economics professors [Tr. 42]. Mantalica (quoted App. Brief, p. 18) could not recall the "slurring remark in reference to the Pope" which she claimed appellant made [Tr. 12] and such a remark, even if made, of course has no bearing on the District Court's findings. The value of the opinions of Spaulding (App. Brief, p. 19) as to appellant's teaching must be judged by the example he offered to illustrate his generalization that appellant was favorable to socialism [see Tr. 34-35, quoted on p. 7 of our Main Brief]. And Spauding's testimony that appellant made slandering remarks against God (App. Brief, p. 19), which is, to say the least, a meaningless piece of testimony, was properly excluded by the District Judge; was incredible in view of appel-

precedented and fallacious character of appellee's approach is highlighted by the uniform tenor of the decisions from all corners of the field of naturalization law: those pointing out that the petitioner for citizenship must meet the requirements established by Congress;[10] those giving careful consideration to the statutory intent with respect to the various requirement;[11] those emphasizing that the courts cannot add to these requirements;[12] and those stressing the doctrine that the naturalization hearing and proceeding are judicial,[13] a concept which implies above all else the use of established standards and procedure. For a denial of citizenship, particularly to one who, like appellant, is a long-time resident with no home or ties other than in the United States, and who in fact for years considered himself a citizen, is a grave and serious

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lant's religious nature (see Main Brief, p. 6); and has in any event no bearing on the findings. The testimony of Professors Cruse and Frankian (App. Brief, p. 19) is dealt with at pages 17 to 21 of our Main Brief and that of Mr. Horton (App. Brief, p. 19) upon whom the District Judge placed no reliance, does not seem worthy of comment.

[10]*In re Warkentin,* 93 F. (2d) 42 (C. C. A. 7, 1937), cert. den. 304 U. S. 563; *Estrin v. United States,* 80 F. (2d) 105 (C. C. A. 2, 1935); *United States v. DeFrancis,* 50 F. (2d) 497 (C. A. D. C., 1931); *United States v. Morelli,* 55 F. Supp. 181 (D. Cal., 1943); *In re Ringnalda,* 48 F. Supp. 975 (D. Cal., 1943); *In re Taran,* 52 F. Supp. 535 (D. Minn., 1943); *United States v. Ritzen,* 50 F. Supp. 301 (D. Tex., 1943).

[11]*Girouard v. United States,* 328 U. S. 61; *Schneiderman v. United States,* 320 U. S. 118; *Schwartz v. United States,* 121 F. (2d) 225 (C. C. A. 9, 1941); *United States v. Rockteschell,* 208 Fed. 530 (C. C. A. 9, 1913).

[12]*Petition of Kohl,* cited *supra,* note 2, at p. 349; *Tutun v. United States,* 12 F. (2d) 763, 764 (C. C. A. 1, 1926); *Schwab v. Coleman,* 145 F. (2d) 672 (C. C. A. 4, 1944).

[13]*United States v. MacIntosh,* 283 U. S. 605, 615; *Petition of Garcia,* 65 F. Supp. 143 (D. Pa., 1946); *In re Oppenheimer,* 61 F. Supp. 403 (D. Or., 1945); *Application of Levis,* 46 F. Supp. 527 (D. Md., 1942).

matter; not only does it involve a refusal of the various prerequisites of citizenship, but it also denies the petitioner the security which a citizen possesses against the possibility of that extremely "drastic measure" of deportation.[14]

The Schneiderman Decision and "the Principles of the Constitution".

While alleging that the *Schneiderman* decision is no authority on the meaning of "the principles of the Constitution" for the purposes of the case at bar, appellee offers no authority to bolster its assertion that appellant's beliefs are inconsistent with such principles, nor does appellee, as pointed out above, make any attempt to demonstrate that the District Court's findings reveal beliefs which have such an inconsistency.

All of appellee's factual statements about the *Schneiderman* decision are true, but none of them refute our assertion that that decision is controlling in a naturalization as well as in a denaturalization proceeding on the question of what are "the principles of the Constitution" to which the naturalization law requires attachment. We did not labor this point in our main brief because it seemed to us clear that the adjudication of "the principles of the Constitution" made for the purpose of determining whether Schneiderman should be denaturalized for lack of attachment thereto at the time of naturalization, would be applicable wherever the content of such principles within the meaning of the naturalization law, was in issue.

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[14] *Fong Haw Tan v. Phelan*, No. 370, Oct. Term, 1947 (decided by the United States Supreme Court, Feb. 2, 1948); *Delgadillo v. Carmichael*, 68 S. Ct. 10.

To clarify this point beyond argument, it is necessary only to refer to the Supreme Court's language with respect to the principles of the Constitution, which demonstrates that the Court was deciding what are the principles of the Constitution to which attachment is required for naturalization. It is these passages, which are apposite in the consideration of the questions of law in the case at bar rather than the Court's general language as to the differences between naturalization and denaturalization and the differences in the burden of proof in such proceedings, which we freely concede.

Thus, the Court said, in introducing its discussion of "the principles of the Constitution":

> "When petitioner was naturalized in 1927, . . . it was to 'be made to appear to the satisfaction of the court' of naturalization that immediately preceding the application, the applicant 'has (been) . . . attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same'. Whether petitioner satisfied this . . . requirement is the crucial issue in this case. To apply the statutory requirement of attachment correctly to the proof adduced, it is necessary to ascertain its meaning." (320 U. S. at pp. 132-133.)

In then determining the meaning of the requirement, the Court, after discussing whether the statute created a test of behavior or a test of belief, felt constrained to adopt the latter test because in *United States v. Schwimmer*, 279 U. S. 644, and *United States v. MacIntosh*, 283 U. S. 605, both naturalization cases. "it was held that the statute created a test of belief" (320 U. S. at p. 135). This passage alone should make it indubitably clear that

the Court was considering the content of the attachment to the Constitution required by the naturalization law without distinction as to the type of proceeding in which the question arose. Then, in discussing what beliefs were to be deemed to show a lack of attachment to the principles of the Constitution, the Court used this language:

> "Our concern is with what Congress meant to be the area of allowable thought under the statute . . . it is not to be presumed that Congress intended to offer naturalization only to those whose political views coincided with those considered best by the founders . . ." (320 U. S. at p. 139.)

And the concluding statement, following the passage quoted in our main brief (page 30) as to the consistency of government ownership with the Constitution, is as follows:

"We conclude that lack of attachment to the Constitution is not shown on the basis of the changes which petitioner testified he desired in the Constitution" (emphasis supplied), a statement which makes it crystal clear that in the preceding discussion the Court was comparing the principles of the petitioner to the principles of the Constitution without regard to the type of proceeding before it.

Finally, the sentence at the close of the passage quoted on page 35 of our main brief, referring to the congressional intention underlying "the general test of 'attachment'" is to be noted.

In conclusion, on this aspect of the case, we do not dispute that insofar as the Supreme Court in the *Schneiderman* decision discussed the burden of proof in that case

and the proof against the petitioner therein, such discussion is not apposite to the case at bar; but we submit that it is incontrovertible that the Supreme Court's holding in the *Schneiderman* case as to the meaning of attachment to "the principles of the Constitution", *is* controlling herein.

We take no exception to the quotations from the *Manzi* and the *Tutun* cases (given on page 17 of appellee's brief) to the effect that doubts are to be resolved against the petitioner for naturalization and that the petitioner must establish that he fulfills the conditions for citizenship; but the issue here is: *what* are the conditions which he must fulfill. Those conditions do not, under the *Schneiderman* decision, include a belief in capitalist, as opposed to collectivist, ownership of industry,[15] and the District Judge's conclusion that because of the lack of this belief, appellant was not attached to the principles of the Constitution is therefore erroneous. The passage quoted in appellee's Conclusion (Brief p. 26) illustrates, we believe, the District Judge's concept that the principles of the Constitution require a complete faith in capitalism, a proposition which we believe is definitely refuted by the *Schneiderman* opinion.

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[15]Compare also the renowned statement of Justice Holmes dissenting, in *Lochner v. New York*, 198 U. S. 45, 75-76:

> ". . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Appellee attempts to argue that appellant was not attached to the principles of the Constitution on the ground that he believed in undemocratic methods of political change. As pointed out in our main brief, the District Judge made no finding that appellant held such a belief. (Main Brief pp. 31-32.) And such a finding would in any event be unsupportable in view of the fact that the passages quoted by appellee (Appellee's Brief pp. 21-23) were not stated to be appellant's views but were merely the citation by appellant of the views of others; further, the time elapsing since the speech must be accorded weight as well as the affirmative credible, and uncontradicted testimony that appellant was a firm believer in democracy and freedom. (See Main Brief pp. 32-33.) We believe the appellant's complete candor about his beliefs, which makes his testimony about them almost impossible to disbelieve, is illustrated by his colloquy with the District Judge as to the future of capitalism (quoted in Appellee's Brief p. 25) in which appellant candidly told the Judge that he could not say with certainty whether or not the present revival of industry is permanent. In any event, even if it be assumed that there were support in the record for a finding of the sort appellee discusses, a finding of such a vital and derogatory nature cannot be inferred, nor can it be supplied by the appeal court.[16]

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[16]The only exception which might be permissible to the rule that the findings must be made by the trial judge is in the event that the evidence is entirely documentary and non-conflicting. See *United States v. Mitchell,* 104 F. (2d) 343 (C. C. A. 8th, 1939).

Conclusion.

The judgment of the Court below should be reversed, and that Court should be directed to grant appellant's petition for citizenship. For the finding on which the lower Court based its conclusion that appellant was not attached to the principles of the Constitution is clearly erroneous, and in any event its conclusion of law that the facts it found showed lack of such attachment is erroneous; further, the record shows that there is no basis other than the one erroneously taken by the District Court for a finding and conclusion of lack of attachment.

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Leo Gallagher,
Herbert Ganahl,
Attorneys for Appellant.

Arthur Garfield Hays,
Osmond K. Fraenkel,
Nanette Dembitz,
Of Counsel, American Civil Liberties Union.
Of Counsel.